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Compliance Workshop Spring 2006

Oregon Family Leave Act (OFLA)

Learn about the unique exposures that OFLA brings to your operation, how it interacts with FMLA and your insurance contracts, how to effectively craft a OFLA policy for your handbook and how to protect your business.

DATE:

Wednesday, May 10, 2006

WORKSHOP SCHEDULE

8:30—9:00 a.m.

Registration/Full Breakfast

9:00—12:00 a.m.

OFLA Workshop

LOCATION:

ClubSport
18120 SW Lower Boones Ferry Road
Tigard, Oregon

COST:

None—includes breakfast and workshop binder

How To Register

Call: (503)244-0297

Fax: (503)244-0298

Email: info@golsanscruggs.com

* Pre-registration required

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RISK MANAGEMENT

ADA—The “Association” Provision

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination on the basis of disability. Title I of the ADA makes it unlawful for any employer with 15 or more employees (including a state or local government employer) to discriminate against a qualified applicant or employee because of a disability in any aspect of employment. In addition to protecting qualified applicants and employees with disabilities from employment discrimination, one ADA provision – the “association” provision – protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, whether or not the applicant or employee has a disability.

The purpose of the association provision is to prevent employers from taking adverse actions based on unfounded stereotypes and assumptions about individuals who associate with people who have disabilities. Thus, it makes unlawful actions such as refusing to hire an individual who has a child with a disability based on an assumption that the applicant will be away from work excessively or be otherwise unreliable, firing an employee who works with people who are HIV positive or have AIDS based on the assumption that the employee will contract the disease, or

denying an employee health care coverage available to others because of the disability of an employee’s dependent.

The association provision of the ADA prohibits employment discrimination against a person, whether or not he or she has a disability, because of his or her known relationship or association with a person with a known disability. This means that an employer is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of a family member or anyone else with whom the applicant or employee has a relationship or association.

The ADA does not require a family relationship for an individual to be protected by the association provision. The key is whether the employer is motivated by the individual’s relationship or association with a person who has a disability.

Prohibited Conduct

An employer may not terminate or refuse to hire someone due to that person’s known association with an individual with a disability.

(Con’t on next page)

POLICY REVIEW

Call-In Policies and the FMLA

In light of a recent district court decision, it may be advisable for employers to review their call-in or absence policies. In *Spraggins v. KnmaiuF Fober Glass GmbH*, the U.S. District Court for the state of Alabama ruled that the employer’s call-in policy may have been impractical.

Family Medical Leave Act (FMLA) regulations dealing with foreseeable leave require an employee to give 30 days notice of a need for leave. When the need for leave is unforeseeable, the employer may require notice as soon as practicable.

In *Spraggins*, the employee was terminated when

he violated his employer’s call-in policy. The policy stated that employees must call at least one hour before their shift begins. The employee called in 54 minutes before his shift started saying that he needed to stay home with his wife who was having complications related to her pregnancy.

The court said that if he did not know that he needed to stay home until it was nearly time to start his shift, then the employer’s one-hour notice requirement would be impractical and would violate the FMLA. As the court did not know when the employee decided that he needed to stay home to care for his wife, the court continued the case until that information could be obtained.

ADA—The “Association Provision” (con’t)

An employer may not deny an employee who has an association with a person with a disability a promotion or other opportunities for advancement due to that association.

An employer may not make any other adverse employment decision about an applicant or employee due to that person's association with a person with a disability.

An employer may not deny an employee health care coverage available to others because of the disability of someone with whom the employee has a relationship or association.

An employer may not deny an employee any other benefits or privileges of employment that are available to others because of the disability of someone with whom the employee has a relationship or association.

An employer may not subject someone to harassment based on that person's association with a person with a disability.

An employer must also ensure that other employees do not harass the individual based on this association.

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation.

① For further information regarding association, go to (http://www.eeoc.gov/facts/association_ada.html).

COURT DECISION

Walking To Work Station Is Compensable

On November 8, 2005, in a unanimous decision, the U.S. Supreme Court agreed with the Department of Labor and meat and poultry workers that the time employees spend walking to their job stations after donning safety gear and returning to the locker room before taking the gear off is compensable under the Fair Labor Standards Act.

The Court determined that the locker rooms where the special safety gear is donned and doffed is the relevant "place of performance" of the employees' principal activity and that walking from that place to another area within the plant immediately after the workday has commenced is compensable.

The Court specifically ruled that "any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" is compensable under the Fair Labor Standards Act.

After the decision was announced, Secretary Chao stated, "Today's unanimous Supreme Court decision in *IBP v. Alvarez and Tum v. Barber Foods* is a tremendous victory for low-wage workers across the country and the Department of Labor. The Supreme Court vindicated the department's position that employees in meat and poultry processing plants must be paid for the time they spend walking between the place where they put on and take off protective equipment and the place where they process the meat."

DOCUMENT MANAGEMENT

I-9 Document Review

Employers' Responsibility under the Law – Document Review Standard

The standard for review of documents in the employment eligibility verification process is that of reasonableness. An I-9 List document is acceptable if it reasonably appears on its face:

- (1) to be genuine and
- (2) to relate to the individual who presents it.

In other words, an employer or employer's agent who signs Section 2 of the Form I-9 is not attesting to the legitimacy of the status of the person who presents the document but, rather, to the fact that he or she has reviewed the original document and that it reasonably appears to him or her, upon reasonable inspection of its features and the information it contains, to be genuine and to relate to the employee who has presented it for employment eligibility verification purposes.

Relationship between Document Review and Continued Employment

If a card reasonably appears to be genuine and to relate to the person presenting it, the employer should not dismiss that employee. However, if a card does not meet this standard, the employer should reject it for employment eligibility verification purposes and ask the individual to produce other acceptable I-9 documentation. In cases where the employee does not produce acceptable documentation that appears to be genuine and to relate to the individual presenting it, the employer should not continue to employ the individual.

Constructive Knowledge

Knowingly hiring or continuing to employ unauthorized aliens is a serious violation that subjects the employer to civil and, where there is a pattern or practice of such violations, criminal penalties. In this context, the term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (1) fails to complete or improperly completes the Form I-9;
- (2) has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (3) acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

NOTE: An employee's foreign appearance or accent is not a relevant factor.

① For further information on I-9 document compliance, go to (<http://www.uscis.com>).